Supreme Court, U. S.
FILED
MAY 21 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1463

MICHAEL S. ROSS, Petitioner,

v.

UNITED STATES ATTORNEY'S OFFICE FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL S. ROSS,	)	CIVIL NO. _____
Plaintiff,	)	
vs.	)	C. D. D. C.
UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA, et. al.,	)	73-2359-DWW
	)	NINTH CIRCUIT
	)	74-1919
Defendants.	)	

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays for a writ of certiorari to the United States

Court Of Appeals For the Ninth Circuit to review orders of said Court entered on February 20, 1975 denying mandatory prosecution and incarceration of Dr. Norman L. Carden pursuant to the provisions of U. S. C., Title 18, Section 3 and Section 1001 and applicable federal kidnapping statutes.

SUMMARY OF LOWER COURT OPINIONS

A decree, included as addendum hereto as Appendix A at page 47, dismissing petitioner's complaint against the United States Attorney's Office For the Central District Of California for lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted was entered in the

United States District Court For the Central District Of California, the Honorable David Williams presiding, on January 8, 1974, Appendix E. Notice of appeal therein, Appendix D, page 46, was filed on January 10, 1974. Eminating from that action the position of the defendants was summarily affirmed on appeal on February 20, 1975, Appendix C, page 45.

JURISDICTION TO REVIEW

The instant action was commenced immediately upon petitioner's discovery that the acts perpetrated by the defendants in interest hterein, Commander Jerry J. Holst and Dr. Norman L. Carden, constituted federal and state crimes.

The judgment sought to be reviewed is the dismissal of petitioner's complaint against Dr. Norman L. Carden in the United States District Court For the Central District Of California for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted on February 20, 1975.

Authority to resolve this potentially irresolveable controversy is conferred upon this Court by U. S. C., Title 28, Section 1651 (a).

These cases are combined in a single petition pursuant to Rule 22j (5) of the Rules of the Supreme Court because they are so intricately related as to render them inextricable.

Plaintiff in the Court below shall hereinafter be referred to as "appellant."

QUESTIONS PRESENTED

First Issue: Whether the taking of between $10,000.00 and $20,000.00 by one individual from another individual to whom the said amount legally belongs without the latter's consent and without court action constitutes a crime of theft or defraudment within the meaning of U. S. C., Title 18, Section 1001.

Second Issue: Whether Dr. Norman L. Carden is guilty of violating U. S. C., Title 18, Section 1001 in averring on appellant's official military record that appellant had voluntarily resigned his Naval Reserve commission in order to join the Air Force when such former action is first unncessary and secondly automatically usurps appellant of at least $10,000.00 in employment income.

Third Issue: Whether in concealing the criminal act of Commander Jerry J. Holst's

illegal taking and defraudment of appellant out of his Naval Reserve commission Dr. Norman L. Carden is guilty of violating U. S. C., Title 18, Section 3 and must be punished therefor.

STATEMENT OF THE CASE

Appellant's motion for summary judgment against defendant federal employee members of the United States Attorney's Office For the Northern District Of California and Commander Jerry J. Holst, real party in interest, for failure and refusal to arrest and convict Commander Jerry J. Holst for violation of United States Code, Title 18, Section 1001 and for intending to defraud, actually defrauding and theiving appellant of his Naval Reserve commission and in excess of $20,000.00 associated therwith was denied on January 18, 1974 in Division 1, United States District Court For the Northern District Of California, the Honorable Spencer Williams presiding, on all counts and

the complaint for mandatory injuction and misfeasance thereupon premised dismissed. Summary affirmance was entered by the Ninth Circuit on June 26, 1974.

This appeal is taken from the rulings denying that the United States Attorney's Office For the Northern District Of California, with jurisdiction, has the duty to arrest and convict Commander Jerry J. Holst pursuant to United States Code, Title 18, Section 1001 and all rulings holding that Commander Holst has any greater authority to take appellant's commission than appellant has to usurp Commander Holst of his commission.

Appellant's complaint for judgment against defendant federal employee members of the United States Attorney's Office

For the Central District Of California and Dr. Norman L. Carden, real party in interest, for failure and refusal to arrest and convict Norman L. Carden for violation of United States Code, Title 18, for falsifying official government records thereby covering up and concealing Commander Jerry J. Holst's act of defrauding appellant out of his Naval Reserve commission and precluding suit by appellant against the Navy to recover same and for violation of U. S. C., Title 18, Section 3, in aiding and abetting the felonious criminal act of the taking of appellant's Naval Reserve commission and $20,000.00 associated therewith by concealing the act of the same was dismissed pursuant to an order sustaining defendant's motion to dismiss entered on January 7, 1974

in Division 1, United States District Court For the Central District Of California, the Honorable David W. Williams, presiding.

This appeal is taken from the rulings denying that the United States Attorney's Office For the Central District Of California, with jurisdiction, has the duty to arrest and convict Dr. Norman L. Carden pursuant to the provisions of United States Code, Title 18, Section 3 and Section 1001.

STATEMENT OF THE FACTS

In May, 1961 appellant joined Naval Reserve Surface Division 11-3 at Los Alamitos, California near Long Beach for the express purpose of serving his country in the most propitious manner possible, in the position of electronics technician. Everything went smoothly for the two years plus from then until June 1963 with appellant advancing as rapidly as legally permissable through the ranks to achieve the goal of attaining the status of and serving his country in the rate of electronic technician third class or better.

By this juncture appellant had become somewhat dismayed and disenchanted with the seemingly low morality prevelant among members of the enlisted rates and so volunteered for Naval Officer Candidate School, was immediately accepted, and completed the first two month training period of the program as a

ROC2 in the summer of 1963, (EXHIBIT 1).

Meanwhile, a decision was made to have appellant transfer from Long Beach State College to the University of California at Berkeley to complete his advanced academic training in chemical engineering. Such action, of course, necessitated a contemporaneous change in Naval Reserve training units as well.

Through the next two years advancement to the rate of electronics technician third class was made impossible by the illegal conduct of the electronic technician first class training instructor at Naval Reserve Surface Division 12-26 who, not only, refused to teach, but also, disallowed quiet self-study, gave no assignments, gave no achievement tests, provided no oppoertunity to take advancement examinations and made a mockery of the training program consuming the total alloted classroom time in the relation of dirty jokes, war stories and personal gossip.

BEST COPY AVAILABLE

Appellant rapidly became fed up and frustrated at this illegal procedure and made serious efforts to have higher authority correct the situation, but they refused. Finally, appellant resolved himself to becoming a Naval Reserve Officer and so began studying his college materials during the otherwise wasted classroom time. After several months of this practice without reprimand and without so much as a negative word being uttered thereabout, appellant reasoned that this was a very inefficient use of the time and so determined to find a quiet place to study where some real accomplishment could be made.

No sooner did the "instructor" discover the fact of appellant's absence than he, apparently, told the same to the commanding officer, Commander Jerry J. Holst. At the very next meeting the commanding officer, Commander Jerry J. Holst, called appellant out on the carpet and immediately informed appellant that

he would recommend appellant's removal from the Naval Reserve Officer Candidate program for "unofficer-like conduct." Appellant protested vigorously and vehemently asked for a hearing, an investigation of the electronic technician class and a courts-martial, if necessary. All such requests were summarily denied by the Captain and appellant was discharged from the program.

With both of his goals and purposes now illegally extorted from him, appellant had, seemingly, no other choice but to run and so he did. In April, 1965 appellant attempted to escape this wrongfully inflicted punishment by finding out if he could entere the Air Force, preferably as an officer. No sooner did the Captain of Naval Reserve Division 12-26 learn of appellant's desire to escape his clutches than he inflicted, without reason, the further punishment of transferring appellant to one of the fleet reserve units thereby requiring an

additional drill period on Friday evenings and no training in any specialty rating whatsoever. Appellant's summer employment in a pre-career position was also lost.

After nearly a year of fighting to extricate himself from the Navy, even if it had to be for an extended tour in the unwanted Air Force, it was allowed on February 20, 1966 just in time for appellant to begin Air Force Officer Training School on February 21, 1966. Appellant completed that school satisfactorily and was graduated as a second lieutenant on May 24, 1966.

At that time appellant was due to begin weather officer school at San Jose State College, but that school was not due to open until approximately June 29, 1966. Therefore, appellant chose to take the one month leave time to which he was entitled. During the course of that vacation, appellant had a falling out with a girl friend whom he had known for one and a half

years preciously and who had encouraged him through the ordeal of the Naval Reserve Surface Division 12-26 illegalities. Appellant became quite upset over the unconscionability of having to continue in the military service thereby placing his life on the line for the very principles of justice, law, equality, fraternity and equality of opportunity which he had grown to know, love and revere and over not having a loved one to render subsidiary the atrocious illegaities and criminalities perpetrated by Naval Reserve Surface Division 12-26 in stealing his rating of third class electronics technician, forcing him by imprisonment to sit in on vile, immoral discussions while depriving him or the opportunity and certainty of advancement and remuneration associated therewith, removing him from the rank of commissioned officer illegally, without a hearing, without any investigation, without reason and without

due process of law, causing him to lose a whole summer of pre-permanent employment training with a company of his choice and removing him to a fleet reserve division where his chances for advancement were quashed forever.

Appellant was finally coaxed into going downtown for a visit with a social worker at Long Beach Mental Health Clinic withwhom the said young lady was acquainted. No sooner did this worker find out that appellant was supposedly associated with the military services than did she without consent, without permission and without telling the party in interest, namely appellant, or his family did inform appellant's "employers?" (emphasis added), San Pedro Army Base, and advise them to come and pick appellant up. Appellant was thus escorted to San Pedro and later to March Air Force Base under his vehement protests.

It was at an enforced consultation several weeks after appellant's incarceration in March Air Force Base hospital was effected illegally by the social worker that Dr. Norman L. Carden perpetrated his blatant and willful falsification. In completing his report on appellant's personal past history he inferred in failing and refusing to include appellant's statement that training and advancment had proceeded smoothly and normally until he arrived at NRSD 12-26 in 1963 wherein the instructor usurped the electronic technician rating appellant had just put in two arduous years earning that appellant had been treated normally and legally by the Naval Reserve and averred specifically that appellant had resigned his Naval Reserve commission in order to join the Air Force. (EXHIBIT 2). That official record prepared by Dr. Carden further asserts that appellant had been in treatment prior to his entry into the service when appellant only said

that he had once visited a doctor at the University who had shortly sent him away with the statement that, "there is nothing wrong with you."

Later, when appellant refused to authenticate this statement of the facts as the official record Dr. Norman L. Carden's chief henchman, one Lt. White, threatened appellant with continued incarceration until he eventually did sign. Lt. White refused to chage the record to reflect the truth or to have it changed. Believing this report not to be legally binding, particularly under the circumstances then obtaining, and that he would be better able to rectify the whole transpiration from without the military, he finally, begrudgingly signed. (See also, Ross v. United States, U. S. Supreme Court docket number 74-184).

REASONS FOR GRANTING THE WRIT

I. ABSENCE OF LEGAL AUTHORITY AND REASON RENDER COMMANDER JERRY J. HOLST'S ATTEMPT TO REMOVE APPELLANT'S NAVAL RESERVE COMMISION IN MARCH, 1965 VOID AB LITO, NUDUM PACTUM, NON-EXISTENT, AND INEFFECTIVE FOR ANY PURPOSE.

A. Commander Jerry J. Holst's Action In Severing Appellant's Commission Was, In Effect And Substance a Complaint Against the United States To Which It Has Not Consented To Be Liable.

There is only one legal authoriztion for the dismissal of service officers, cadets and midshipmen, U. S. C., Title 10, Section 818:

> "Art. 18. General Court-Martial Jurisdiction:
>
> Subject to section 817 of this title (Article 17), general courts-martials have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may under such limitations

> as the President may prescribe adjudge any punishment not forbidden by this chapter, including the death penalty, when specifically authorized by this chapter. General courts-martials also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

Moreover, the extent of Commander Holst's authority is specifically limited by U. S. C., Title 10, Section 815 to punitive punishments.

Finally, even were a prosecution for "conduct unbecoming an officer and a gentleman" under U. S. C., Title 10, Section 933 successful, which it could not be, Article 95 of the Articles of War requires appellant's separation from the service upon conviction.

Thus, there exists no means of escaping the conclusion that relative to any other employment except that of civilian employment--repeatedly sought by appellant in 1965, defendant in interest, Commander Jerry J. Holst's action in severing appellant summarily from Naval Reserve officer

status thefted, robbed, defrauded, cost and deprived appellant of a minimum of $10,000.00 and $20,000.00 relative to civilian employment.

It being the case that the only recourse to recovering this loss lies in the suit for correction of military records now pending before the United States District Court For the Central District Of California and on appeal from the United States Court Of Claims to the United States Supreme Court which amounts to nothing more than securing a trial on the merits of the facts then pertaining, guaranteed irrevocably to appellant and all United States citizens by the Fifth Amendment to the United States Constitution, Commander Holst must necessarily be liable for appellant's costs of suit, now in excess of $100,000.00 or criminal prosecution for intent to defraud, actual

defraudment and theft or both such civil and criminal responsibility.

Morevoer, if Commander Holst's action in severing appellant's commission can in any way be construed as nothing more than breech of appellant's commissioned employment contract as the District Court indicates, then appellant breeches the enlisted employment contract, if, in fact, one exists at that date in May, 1965, as evidenced by his non-attendance at any future drills upon his return to Berkeley in the fall of 1965, is entitled to recover and recovers $100,000.00 from his employment losses through the preceeding eight years, expungement of his record and repays the Government the two thousand plus dollars, out of his first six months salary, its representative Commander Holst perceives appellantis services are worth as a seaman.

The only was appellant could avoid

any loss at all would be to hire an attorney to seek a mandamus petition to compel a court-martial trial of himself on the issues, a responsibility for the burden of showing innocence of which all defendants are expressly exempted by the Fifth Amendment to the United States Constitution.

Further, no authority exists for Commander Host to alter appellant's contract to suit his own wishes.

Additionally, if, defendant in interest, Commander Holst has authority to demote appellant, then appellant also has authority to demote Commander Holst since appelant most assuredly would have advanced to that said position of Commander in the Naval Reserve by now and does so demote Commander Holst to seaman over the past eight years and exchanges command position

with him.

Inasmuch as at the time in March, 1965 when the criminal act of taking at least $10,000.00 from appellant was perpetrated by Commander Jerry J. Holst, appellant was an officer of the United States and inasmuch as such act sought to affect appellant in his official duties pursuant to the discretionary function of maintaining the satisfactory performance required of him by C. F. R., Title 32, Section 100.1 and Section 101.3, such act, in effect, is one against the United States. Many reservists have been the subject of early induction under the provisions of this section. As such it requires a statutory relinquishment of sovereign immunity or no Court has jurisdiction to uphold it and it must be considered void, nudum pactum and non-existent. Hawaii v. Gordon, 373 U. S. 57, 58 (1963); Dugan v. Rank, 372 U. S. 609,

620, (1963); Mancilla v. United States, 382 F. 2d. (C. A. 9th 1967) cert. den., 390 U. S. 982. Further, Congress must constitute a governmental agency such as "Michael S. Ross, U. S. Navy Seaman and Officer Candidate" as a suable entity." Gnotta v. United States, 415 F. 2d. 1271, 1277, (8th Cir. 1969); Blackmar v. Guerre, 342 U. S. 512, (1952). Obviosly, then appellant's prosecution by Commander Holst must be dismissed as of 1965 together with all the attendant consequences thereof, for the named defendant in that case, Michael S. Ross,is not and was not a suable entity and if appellant's discretionary acts pursuant to the performance of his official duties are not controlable by the courts then unequivocally they cannot be subject to Commander Holst's mandate.

That this discretionary prosecutive power be exercised by the United States prosecutors and not Commander Holst is essential to maintaining the separation of powers between the judicial and executive branches. Newman v. United States, 382 F. 2d. 479, (D. C. Cir. 1967). Mandamus by Commander Holst, therefore, will not lie to control the exercise of that discretion. Peek v. Mitchell, 419 F. 2d. 575, (6th Cir. 1970); Smith v. United States, 375 F. 2d. 243, (5th Cir. 1967), cert. denid, 389 U. S. 841, (1967); Powell v. Katzenback, 359 F. 2d. 234, (D. C. Cir. 1965); cert. den. 384 U. S. 906, (1966); United States v. Cox, 342 F. 2d. 167, (5th Cir.), cert. denied, 381 U. S. 935, (1965); Bass Anglers Sportsman's Society v. Scholze Tannery, Inc., 329 F. Supp. 339, (E. D. Tenn. 1971); Moses v. Kennedy, 219 F. Supp. 762, (D. C. 1963), aff'd without

opinion, 342 F. 2d. 931, (D. C. Cir. 1965).

Thus, Commander Holst's complaint fails to state a claim upon which relief can be granted.

II. THERE IS NO QUESTION THAT COMMANDER HOLST KNEW WHAT HE WAS DOING WHEN HE TOOK APPELLANT'S COMMISSION SUMMARILY; THERE IS NO QUESTION ABOUT THE FACTS SURROUNDING THE ACT; THE LAW MAKES VERY CLEAR THE PUNISHMENT FOR PERPETRATING SUCH ACTS; THEREFORE, THE UNITED STATES ATTORNEY'S OFFICE HAS NO CHOICE BUT TO ARREST AND CONVICT COMMANDER JERRY J. HOLST FOR VIOLATING U. S. C., TITLE 18, SECTION 1001 AND OTHER APPLICABLE FEDERAL CRIMINAL THEFT AND ROBBERY STATUTES.

The interest of one involved in a purely training program with its sole function and purpose and reason for existence being that of advancing the personnel within its sphere of influence to a set or maximum

achieveable level of competency and performance and position of respect and responsibility is identical in substance with that of one already in such status. In fact, the law prescribes specific penalties for such failure of achievement, C. F. R., Title 32, Sections 100.1, 100.2, 100.3 and 101.3 and they have been enforced, Henchan v. Laird, 314 F. Supp. 796, (1969 D. C. Mo.) affr'd 427 F. 2d. 980, (8th Cir.) and Schaaten v. United States, (1969 C. A. 6th Mich.), 419 F. 2d. 187. See also, Baugh v. Bennett, 329 F. Supp. 20, (1971 D. C. Idaho) and Smith v. Resor, 406 F. 2d. 141, 13 A. R. F. 175, (1969 C. A. 2nd N. Y.).

Surely, then one who has given of himself and his own private time is entitled to the same protections and safeguards against usurpation and taking of his only means of securing such station as one who

has already been accorded such status. Concededly, then in the case of an electronic technician third or second class elect, an electronic technician first class instructor, intuitively, has no authority to demote him to seaman. Any attempt theretodo or success therein doing, consequently, necessarily can only be construed as guilt of an intent to defraud or theft one of the difference between the salary of a seaman and that of an electronic technician second class over the years of prospective service, or about $4,500.00 in the instant case. A substantial sum, well in excess of the $100.00 required to render such action felonious in California, California Penal Code, Section 17 and under federal criminal statutes. Not to mention the libel of incapability of performance and

failure of achievement in addition to the criminal stigma attaching by virtue of a technical conviction for "unofficer-like conduct," i. e. criminal misconduct.

Moreover, even though the Commanding Officer, Commander Jerry J. Holst, in the case at bar, had the right to demote petitioner up to two steps for any single transgression, U. S. C., Title 10, Section 815. Even that authority, except in actual war, Fifth Amendment, is not unqualified, U. S. C., Title 10, Section 817. Petitioner could, as a matter of absolute right refuse non-judicial punishment, U. S. C., Title 10, Section 817. An option petitioner obviously chose to exercise by denouncing the electronic technician instructor's authority to demote him and Commander Holst's authority to sustain such demotion. Then, he must be accorded a summary or higher order courts-martial as

the severity of the offense dictates, U. S. C., Title 10, Section 817, 818, 819 and 820.

Hence, Commander Jerry J. Holst by himself could not even have legally accomplished petitioner's diminuation to seaman. Rendering his acts of assension to and support and aid of the electronic technician instructor equally as culpable as feloniously extracting remuneration in excess of $100.00 from petitioner. Thereby Commander Holst is entitled to imprisonment for up to five years and fine of $10,000.00 or both such fine and imprisonment.

Consequently, petitioner cannot be punished to any extent except upon a finding of guilty imposed by a duly convened and properly legally constituted courts-martial.

Commander Holst's action makes petitioner both the victim and the criminal.

From the bottom of the continuing heirchy they lock the people committing acts as corrupt, criminal and ignomious as these- in jail. This is where Commander Jerry J. Holst belongs. When crime pervades from the top there is no way of stopping it from infiltrating every nook and cranny all the way down through the ranks. In fact, the only was for petitioner to avoid criminality himself is to become involved in the type of action petitioner is engaged in here.

In this connection the Congress of the United States, as respresentative of the citizenry of the United States, has seen fit, and properly so, to render acts of fraud which effectuate removal of funds from the United States treasure under false pretences or naturally tend to sway the determinations of the tribunals created to render such decision, criminal, U. S. C.

Title 18, Section 1001, U. S. v. Allen, D. C., Cal. 1951, 193 F. Supp. 954, Blake v. U. S., C. A. Mo. 1963, 323 F. 2d. 245, Gonzales v. U. S., C. A. N. M. 1960, 286 F. 2d. 118, cert. den. 81 S. Ct. 1028, 365 U. S. 878, 6 L. Ed. ex. 190.

Obviously, purposely, there is no possible preferrable manner than the above statute in which the clearcut duty of prosecution, under the circumstances herein obtaining, could more precisely, patently and lucidly be described.

All of the elements of the offense (1) statement, (2) falsity, (3) the false statement being made "knowingly and willfully" and (4) that the false statement be in a matter within the jurisdiction of a department or agency of the United States are patently in evidence here, U. S. v. Marchisio, C. A. N. Y. 1965, 344 F. 2d. 653.

Without action by the United States

Attorney, a wrong exists without possibility of redress. Moreover, even a section providing for civil sanctions which makes no additional provision for criminal sanctions is no barr to prosecution under this statute, U. S. v. Johnson, D. C. Mo. 1968, 284 F. Supp. 273, aff. 410 F. 2d. 28, cert. den. 90 S. Ct. 63, 396 U. S. 822, 24 L. Ed. 2d. 72.

Commander Jerry J. Holst's act of willfully falsely representing to the tribunal with authority to render the penultimate decision that petitioner was guilty of perpetrating a criminal act in avoiding joke telling sessions in the electronic technician classroom at NRSD 12-26 when he knew that said classroom was conducted illegally and that appellant had not yet utilized his allotment of 10% unexcused absences allowed him under C. F. R., Title 32, Section 101.3 and thereby convicting

appellant thereof and taking action thereupon to remove appellant's commission [EXHIBIT 1], besides being ineffective, U. S. C., Title 10, Section 815, 818, 819, 820 and 933 was and continues to be criminal. In refusing to halt the "electronic technician instructor's" illegal acts of shirking, [EXHIBIT 2], C. F. R., Title 32, Sections 713.381 (a) (3) & (b) and 730.12 (b) and in stealing appellant's electronic technician third clasship and $4,500.00 [EXHIBIT 3], electronic technician knowledge and officership and $20,000.00, Commander Holst is guilty, to be sure with and after trial, of a crime more villanous, heineous and ignomous than that of the common thus on the street who demands the same $20,000.00 at the point of a knife or gun. For here the victim, appellant, not only loses $20,000.00 of officer remuneration and the respect and honor associated therewith,

but also becomes the scapegoat for an illegal activity and acquires an un= warranted criminal label as well. Thus, this undertaking is doubleley as grevious as the aforementioned one and must be punished to the limit of the law, U. S. C., Title 18, Section 1001.

"Nor can the statute be construed narrowly to apply only to matters in which the government has some financial interest, Pith v. U. S., C. A. Cal. 1969, 263 F. 2d. 1253, cert. denied 79 S. Ct. 1457, 360 U. S. 935, 3 L. Ed. 2d. 1547, rehearing denied 80 S. Ct. 47, 361 U. S. 857, 4 L. Ed. 2d. 97. (See also, U. S. v. Goldsmith, C. C. A. N. Y. 1940, 108 F. 2d. 217, cert. denied 60 S. Ct. 715, 309 U. S. 678, 84 L. Ed. 1022, rehearing denied 60 S. Ct. 1073, 310 U. S. 657.

In fact, even such innocent

delusions as "concealing a material fact by maintaining a false prescription file" have not escaped detection and conviction, Coil v. U. S., C. A. Neb. 1965, 343 F. 2d. 573. See also, U. S. v. Tamasello, C. C. A. N. Y. 1947, 760 F. 2d. 348. Nor are federal employees immune, U. S. v. Eiseimann, C. A. N. Y. 1968, 396 F. 2d. 565.

And, the military is included in its scope, U. S. v. Meyer, C. C. A. N. Y. 1949, 140 F. 2d. 652. In fact, in a case exactly in the reverse of the instant one an enlisted member of the armed forces was convicted under former Section 677 of Title 50 by courts-martial for "fraudulent enlistment" and as well under Section 1001, when that court held that the former section merely provides additional authority for dealing

with and does not repeal or modify this Section," U. S. v. Mamber, D. C. Mass, 1955, 127 F. Supp. 925.

Furthermore, to convict, no finding of intent is required, McBride v. U. S., U. S. C. A. Tex. 1955, 275 F. 2d. 249, cert. denied 76 S. Ct. 306, 350 U. S. 934, 100 L. Ed. 816, but only that the defendant had acted with reckless abandon, U. S. v. Eyenburg, C. A. 1971, 441 F. 2d. 441, cert. denied 92 S. Ct. 530, 404 U. S. 994, 30 L. Ed. 2d. 546.

III. THERE IS NO QUESTION THAT DR. NORMAN L. CARDEN KNEW EXACTLY WHAT THE TRUE FACTS WERE, FOR HE HAD NO SOURCE OTHER THAN APPELLANT, YET HE PURPOSE-FULLY, WILLFULLY, AND MALICIOUSLY PROCEEDED TO FALSIFY APPELLANT'S OFFICIAL MILITARY

RECORDS FOR SUBSEQUENT READERS IN ORDER TO PROTECT HIMSELF FROM THE COMPLICATIONS OF HAVING TO BLAME NAVAL RESERVE SURFACE DIVISION 12-26 FOR WHAT HAD OCCURRED AND TO SHIELD THE NAVY FROM FUTURE SUIT FOR CORRECTION OF THEIR ILLEGAL ACTIONS; THE LAW VERY PRECISELY DEFINES THE PUNISHMENT FOR PERPETRATING SUCH ACTS; THEREFORE, THE UNITED STATES ATTORNEY'S OFFICE HAS AND CAN HAVE NO CHOICE BUT TO ARREST AND CONVICT DR. NORMAN L. CARDEN FOR VIOLATING U. S. C., TITLE 18, SECTIONS 3 AND 1001 AND OTHER APPLICABLE FEDERAL CRIMINAL STATUTES.

The Congress of the United States, as representative of the citizenry of the United States, has seen fit, and properly so, to render acts of fraud which effectuate removal of funds from the United States treasure under false

pretenses or naturally tend to sway the determinations of the tribunal created to render such decision, criminal, U. S. C., Title 81, Section 1001, U. S. v. Allen, supra, Blake v. U. S., supra, Gonzales v. U. S., supra.

Obviously, purposely, there is no possible preferrable manner in which to phrase the above statute in which the duty of prosectution under the circumstances herein obtaining, could be more precisely delineated and lucidly described.

All of the elements of the offense (1) statement, (2) falsity, (3) the false statement being made "knowingly and willfully" and (4) that the false statement be in a matter within the jurisdiction of a department or agency of the United States are patently satisfied here, U. S. v. Marchisio, supra.

Again, without cation by the United States Attorney, a criminal wrong exists without possibility of remedy.

And, the military is included in its scope, U. S. v. Meyer, supra.

"Nor can the statute be construed narrowly to apply only to matters in which the Government has some financial interest," Pith v. U. S., supra, and U. S. v. Goldsmith, supra.

In fact, even such innocent delusions as "concealing a material fact by maintaining a false prescription file," have not deterred conviction, Coil v. U. S., supra and U. S. v. Tammasello, supra.

Moreover, even a section providing for civil penalties which makes no additional provision for criminal sanctions is no barr to prosecution under this statute, U. S. v. Johnson, D. C. Mo.

1968, 284 F. Supp. 273, aff. 410 F. 2d. 38, cert. denied 90 S. Ct. 63, 396 U. S. 822, 24 L. Ed. 2d. 72.

Furthermore, to convict, no finding of intent, McBride v. U. S., supra, is required, but only that the defendant had acted with reckless abandoned, U. S. v. Eyenburg, supra.

IV. INASMUCH AS THE ACTS PERPETRATED BY COMMANDER JERRY J. HOLST AND SOUGHT TO BE COVERED UP BY DR. NORMAN L. CARDEN IN AND OF THEMSELVES CONSTITUTE A CRIME OF INTENT TO DEFRAUD, DEFRAUDMENT AND THEFT IN VIOLATION OF U. S. C., TITLE 18, SECTION 1001, DR. NORMAN L. CARDEN IS PATENTLY GUILTY OF THE ACT OF CONCEALING A CRIME, SEPARATELY PUNISHABLE UNDER U. S. C., TITLE 18, SECTION 3, HENCE, THE UNITED STATES ATTORNEY'S OFFICE HAS NO ALTERNATIVE BUT TO CONVICT HIM THEREOF.

The act of conealing a crime, separately punishable under U. S. C., Title 18, Section 3 in this particular instance is equally as heineous and offensive as that of Commander Holst in stealing appellant's commission, or a thug demanding $20,000.00 at the point of a gun, for in asserting that appellant voluntarily resigned his Naval Reserve commission in order to attend Air Force Officer Training School, Dr. Carden was stealing, at least, $10,000.00 in lost income by eliminating appellant's cause of action to show that his course of service and payment must necessarily be in the Naval Reserve mode or non-existent and exculpating the Navy from responsibility for the resultant $10,000.00 plus loss in service remuneration and dual illegal demotion perpetrated thereby.

CONCLUSION

Accordingly, Commander Jerry J. Holst's action fails to state a claim at all much less any jurisdiction to grant relief and appellant is entitled to reinstatement of his Naval Reserve commission together with all of its appurtenances, expungement of his record, in excess of $100,000.00 in back pay and Commander Jerry J. Holst's conviction for theft and intent to defraud appellant of $20,000.00. In addition, in view of all of the foregoing it can only reasonably be condluded that Dr. Norman L. Carden has so maliciously violated the provisions of Title 18, Section 3 and Title 18, Section 1001 of the United States Code that the law and the United States Attorney's Office can have no choice but to convict him of violation thereof.

Michael S. Ross

FEB 20 1975
U.S. COURT OF APPEALS
CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPENDIX C

MICHAEL S. ROSS,

Plaintiff-Appellant,

vs.

THE UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA INCLUDING MESSRS. ROBERT C. BONNER AND MICHAEL SULNER, ASSISTANT AND DEPUTY ATTORNEY, CRIMINAL COMPLAINTS,

Defendant-Appellee.

No. 74-1919

OPINION

Appeal from the United States District Court for the Central District of California

Before: KOELSCH and GOODWIN, Circuit Judges, and RENFREW,* District Judge.

PER CURIAM:

The well-settled principle that mandamus does not lie to compel a United States District Attorney to perform a discretionary act (Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2nd Cir. 1973)) is dispositive of this appeal.

Affirmed.

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* The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX D

MICHAEL S. ROSS
2318 Ledoux Avenue
Durham, South Carolina 27705
TEL: (919) 477-8773
In Properia Persona

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. ROSS,

Plaintiff,

vs.

THE UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA INCLUDING MESSRS. ROBERT C. BONNER AND MICHAEL SULNER, ASSISTANT AND DEPUTY UNITED STATES ATTORNEY, CRIMINAL COMPLAINTS,

Defendants.

CIVIL NO. 73-2359-DWW

NOTICE OF APPEAL

Notice is hereby given that Michael S. Ross, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Of Dismissal Of Plaintiff's Cause Of Action against the United States Attorney's Office For the Central District Of California entered in this action of the 7th day of January, 1974.

This 10th day of January, 1974, at Durham, North

Signed: [signature]

2318 Ledoux Avenue
Durham, North Carolina
27705
(919) 477-8773

APPENDIX E

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division
CLARKE A. KNICELY
Assistant U. S. Attorney
1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2445

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. ROSS,

Plaintiff,

v.

THE UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA INCLUDING MESSRS ROBERT C. BONNER AND MICHAEL SULNER, ASSISTANT AND DEPUTY UNITED STATES ATTORNEY, CRIMINAL COMPLAINTS,

Defendants.

CIVIL NO. 73-2359-DWW

ORDER OF DISMISSAL

The above-entitled cause came on regularly for hearing on defendants' Motion to Dismiss January 7, 1974, before the Honorable David W. Williams, United States District Judge, the defendants appearing by their counsel, William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, by Clarke A. Knicely, Assistant U. S. Attorney, no appearance being made by or on behalf of plaintiff, and the Court having considered the written motion papers and written argument of defendants and plaintiff, on file herein, and being fully advised in the premises,

IT IS ORDERED that defendants' Motion to Dismiss for failure to state a claim be and the same is hereby granted, that plaintiff take nothing by virtue of his Complaint and that

/ / /

CAK:dsg

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plaintiff's action be and the same is hereby dismissed with prejudice.

DATED: This____day of_____, 1974.

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division

/s/ Clarke A. Knicely
CLARKE A. KNICELY
Assistant U. S. Attorney

Attorneys for Defendants

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California Penal Code, Section 17

Felony; misdemeanor; classification of offenses

(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) Whan the court commits the defendant to the Youth Authority.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a

misdemeanor, unless the defendant at the time of his arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination and with the consent of the prosecuting attorney and the defendant, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

United States Code, Title 18, Section 3

Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

United States Code, Title 18, Section 1001

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,

fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

U. S. C., Title 10, Section 815

Article 15. Commanding Officer's Non-Judicial Punishment.

(a) Under such regulations as the President may prescribe, the commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial

(1) upon officer of his command--

(a) withholding priviledges for not more than two consecutive weeks;

(b) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks;

(c) if imposed by an officer exercising general courts-martial jurisdiction, forfeiture of not more than half of one month's pay;

(2) upon other military personnel of his command--

(a) withholding of priviledges for not more than two consecutive weeks;

(b) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks;

(c) extra duty for not more than two consecutive weeks and not more than two hours per day, holidays included;

(d) reduction to next inferior grade, if the grade from which demoted was established by command or equivalent or lower command;

(e) if impolsed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or

(f) if imposed upon a person attached to or embarked in a vessle, confinement on bread and water or diminished rations for not more than three consecutive days.

(b) The Secretary concerned may be regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the catagories of commanding officers authorized to exercise those powers and the applicability of this article to an accused who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted members assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by the commanding officer as the Secretary concerned may by regulation specifically prescribe as provided in subsections (a) and (b).

(d) A person punsihed under this article who considers his punishment unjust or diappropriate to the offense may, through proper channels, appeal to

to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment, his successor in command, and the superior authority may suspend, set aside, or remit any part or amount of the punishment and restore all rights, priviledges and property affected.

(e) The imposition and enforcement of disciplinary punishment under this article for nay act or omission is not a bar to trial by court-martial for a serious crime growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measurement of punishment to be adjudged in the vent of a finding of guilty.

U. S. C., Title 10, Section 818

Article 18. General Court-Martial Jurisdiction.

Subject to section 817 of this title (Article 17), gneral courts-martials have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may under such limitations as the President may prescribe adjudge and punishment not

forbidden by this chapter, including the death penalty, when specifically authorized by this chapter. General courts-martials also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

U. S. C., Title 10, Section 819

Art. 19. Special Court-Martial Jurisdiction.

Subject to section 817 of this title (Article 17) special courts-martials have jurisdiction to try persons subject to this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martials may, under such limitations as the President may prescribe adjudge and punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than 6 months, hard larbor without confinement for more than 3 months, forfeiture of pay for more than 6 months. A bad conduct discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

U. S. C., Title 10, Section 820

Article 20. Jurisdition of Summary Courts-Martial

Subject to Section 817 of this title (Art. 17) summary courts-martials shall have jurisdiction to try persons subject to this chapter, except officers, cadets, avaition cadets and midshipmen, for any non-capital offense made punishable by this chapter. No person with respect to whom summary courts-martials have jurisdiction may be brought to trial before a summary court-martial if he objects thereto, unless under Section 815 of this title (Art. 15), he has been permitted and has elected to refuse punishment under that article. If objection to trial by summary court-martial is made by an accused who has not been permitted to refuse punishment under Section 815 of thistitle (Art. 15), trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martials may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the chapter except death, dismissal, dishonorable, or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than 2/3 of one month's pay.

U. S. C., Title 10, Section 933

Article 133. Conduct Unbecoming and Officer And a Gentleman

A commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

U. S. C., Title 10, Section 95

Article 95. Article 95 Of the Articles of War

An officer or cadet who is convicted of conduct unbecoming an officer shall be dismissed from the service.

STATE OF NORTH CAROLINA)
)
CITY OF DURHAM, COUNTY OF DURHAM)

_____

being first duly sworn on oath, says:

I am a citizen of the United States and a resident of the City of Durham and County of Durham, State of North Carolina. I am over the age of eighteen years and not a party to the within action. My business address is _____.

On September 21, 1974, I served the within "PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS," on the defendant United States in said action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Durham, North Carolina, addressed as follows:

Erwin N. Griswold

Solicitor General of the United States

Department of Justice Building

Constitution Avenue between 9th and 10th

Streets

Washington, D. C., 20530

Signed:_____

Subscribed and sworn to before me this 24th day of September, 1974.

Supreme Court, U. S.
FILED
JUL 10 1975
MICHAEL RODAK, JR., CLERK

No. 74-1463

In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL S. ROSS, PETITIONER

v.

UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1463

MICHAEL S. ROSS, PETITIONER

v.

UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought an action in the nature of mandamus, under 28 U.S.C. 1361, to compel respondent to prosecute a medical doctor for allegedly making false statements about petitioner's military and medical histories in a medical report prepared by the doctor and made part of petitioner's naval record. The district court dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App. 47-48), and the court of appeals affirmed *per curiam* (Pet. App. 45).

The decision of the court of appeals is correct and no issue warranting further review is presented. It is well settled that mandamus does not lie to compel a United States Attorney to institute criminal proceedings.

Inmates of Attica Correctional Facility v. *Rockefeller*, 477 F.2d 375 (C.A. 2); *Peek* v. *Mitchell*, 419 F.2d 575 (C.A. 6); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906; *United States* v. *Cox*, 342 F.2d 167 (C.A. 5) (*en banc*), certiorari denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1975.